

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NAM NHAT NGO,

Defendant.

Case No.: 97-CR-3397-GPC

**ORDER GRANTING DEFENDANT'S  
MOTION FOR REDUCTION OF  
SENTENCE UNDER 18 U.S.C. §  
3582(c)(1)**

[ECF No. 60]

Defendant Nam Nhat Ngo ("Ngo") has filed a motion seeking compassionate release or reduction of his sentence under 18 U.S.C. § 3582(c)(1). (ECF No. 60.) The Government opposes. (ECF No. 66.) ("Opp.") For the reasons that follow, Ngo's motion is GRANTED.

**I. BACKGROUND**

Ngo was charged with two counts of armed bank robbery in violation of 18 U.S.C. § 2113, and two counts of using a firearm during and in relation to those robberies, in violation of 18 U.S.C. § 924(c)(1)(A). (ECF No. 1.) The charges arose out of two armed bank robberies during August and September of 1997. (*Id.*) The Government contended

1 that Ngo had committed the robberies by threatening customers and tellers with a pistol  
2 and semi-automatic handgun. (ECF No. 23.) A jury found Ngo guilty of all four counts.  
3 (ECF No. 28.)

4 Ngo was sentenced to a term of imprisonment of 370 months. (ECF No. 60 at 3.)  
5 On the two counts of armed bank robbery, the court sentenced Ngo to “the low end of  
6 [the] guideline range in light of [his] background” and the information he put forth at  
7 sentencing, resulting in a sentence of 70 months for each count to run concurrently.  
8 (ECF No. 60-2, Exhibit D at 41; ECF No. 33.) On the Section 924(c) counts, Ngo was  
9 sentenced to the mandatory minimum of five years for the first count and the mandatory  
10 minimum of twenty years for the second count, to be served consecutively. (ECF No. 60-  
11 2, Exhibit D at 42; ECF No. 33.)

12 Ngo is currently serving his sentence at Sandstone FCI in Minnesota. (ECF No. 60  
13 at 5.) Ngo has served about 278.5 months, or over 75 percent of his sentence, and has  
14 over three years remaining before his projected release date. (ECF No. 67 at 1; Opp. at  
15 4.) Ngo filed the present motion to ask the Court to reduce his sentence to time served  
16 pursuant to the First Step Act. (ECF No. 60.)

## 17 II. Discussion

18 Ngo moves for release under 18 U.S.C. § 3582(c)(1)(A), which provides, in  
19 relevant part:

20 The court may not modify a term of imprisonment once it has been imposed except  
21 that—

22 (1) in any case—

23 (A) the court, upon motion of the Director of the Bureau of Prisons, or upon  
24 motion of the defendant after the defendant has fully exhausted all  
25 administrative rights to appeal a failure of the Bureau of Prisons to bring a  
26 motion on the defendant's behalf or the lapse of 30 days from the receipt of  
27 such a request by the warden of the defendant's facility, whichever is earlier,  
may reduce the term of imprisonment (and may impose a term of probation or

1 supervised release with or without conditions that does not exceed the  
2 unserved portion of the original term of imprisonment), after considering the  
3 factors set forth in section 3553(a) to the extent that they are applicable, if it  
finds that—

- 4 (i) extraordinary and compelling reasons warrant such a reduction; or  
5 (ii) the defendant is at least 70 years of age, has served at least 30  
6 years in prison, pursuant to a sentence imposed under section 3559(c),  
7 for the offense or offenses for which the defendant is currently  
imprisoned, and a determination has been made by the Director of the  
Bureau of Prisons that the defendant is not a danger to the safety of  
any other person or the community, as provided under section  
9 3142(g);

10 . . .

11 and that such a reduction is consistent with applicable policy statements  
12 issued by the Sentencing Commission.

13 Accordingly, there are two questions before the Court: first, whether Defendant has  
14 satisfied the administrative exhaustion requirement, and second, whether Defendant has  
15 demonstrated “extraordinary and compelling” reasons for a sentence reduction.

16 The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, “amends  
17 numerous portions of the U.S. Code to promote rehabilitation of prisoners and unwind  
18 decades of mass incarceration.” *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D.  
19 Iowa 2019) (citing Cong. Research Serv., R45558, The First Step Act of 2018: An  
20 Overview 1 (2019)). One of the changes resulting from the Act is that it “allows  
21 defendants, for the first time, to petition district courts directly for compassionate  
22 release.” *Id.* As one district court recently explained:

23 The effect of the amendments is that a district judge has the ability to grant a  
24 prisoner’s motion for compassionate release even in the face of BOP opposition or  
25 its failure to respond to a prisoner’s request for compassionate release in a timely  
manner. . . . Congress’s express purpose in implementing these changes was to  
26 expand the use of compassionate release sentence reductions under §  
3582(c)(1)(A). *See, e.g.*, First Step Act, PL 115-391, 132 Stat 5194, 5239 (titling

1 the subsection amending § 3582, “Increasing the Transparency and Use of  
 2 Compassionate Release”); 164 Cong. Rec. S7314- 02, 2018 WL 6350790 (Dec. 5,  
 3 2018) (statement by Senator Cardin, cosponsor of the First Step Act, noting that its  
 4 purpose was to “expand[s] compassionate release” and “expedite[] compassionate  
 release applications”).

5 *United States v. Young*, No. 2:00-CR-00002-1, 2020 WL 1047815, at \*5 (M.D. Tenn.  
 6 Mar. 4, 2020); *see also United States v. Maumau*, No. 2:08-CR-00758-TC-11, 2020 WL  
 7 806121, at \*4 (D. Utah Feb. 18, 2020) (“[O]ne of the express purposes of the First Step  
 8 Act was to increase the use and transparency of compassionate release.”).

#### 9           **A. Exhaustion Requirement**

10           Section 3582(c)(1)(A) imposes an exhaustion requirement which must be satisfied  
 11 before a defendant may move the court for a sentencing reduction. On April 29, 2020,  
 12 Ngo submitted a request for release pursuant to 18 U.S.C. § 3582 to the Warden of  
 13 Sandstone FCI. (ECF No. 60-2, Exhibit G.) His request was premised on changes in  
 14 sentencing guidelines and protocols as a result of the First Step Act. (*Id.* at 39.) Ngo’s  
 15 request to the Warden was denied on June 3, 2020. (*Id.*) The Government concedes Ngo  
 16 has properly exhausted his administrative remedies. (ECF No. 66 at 7, n. 2.)  
 17 Accordingly, Ngo has satisfied the exhaustion requirement, and the Court may adjudicate  
 18 his compassionate release motion.

#### 19           **B. Extraordinary and Compelling Reasons**

20           Section 3582(c)(1)(A) permits a sentence reduction only upon a showing of  
 21 “extraordinary and compelling reasons,” and only if “such a reduction is consistent with  
 22 applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. §  
 23 3582(c)(1)(A). Section 1B1.13 of the Sentencing Guidelines further explains that a  
 24 sentence reduction under 18 U.S.C. § 3582(c)(1)(A) may be ordered where a court  
 25 determines, “after considering the factors set forth in 18 U.S.C. § 3553(a),” that:

26           (1) (A) Extraordinary and compelling reasons warrant the reduction;

•

(2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) The reduction is consistent with this policy statement.

5 Application Note 1 to this Guidelines provision enumerates certain circumstances  
6 constituting “extraordinary and compelling reasons” that justify a sentence reduction,  
7 including certain medical conditions, advanced age, certain family circumstances, or  
8 some “other” reason “[a]s determined by the Director of the Bureau of Prisons, there  
9 exists in the defendant’s case an extraordinary and compelling reason other than, or in  
10 combination with, the reasons described in subdivisions (A) through (C).” U.S.S.G. §  
11 1B1.13 n.1. The commentary also provides that a defendant’s rehabilitation, standing  
12 alone, cannot be the sole grounds for a sentence reduction under § 3582(c). *Id.*

13        “In the wake of the First Step Act, numerous courts have recognized the court can  
14 determine whether extraordinary and compelling reasons exist to modify a sentence – and  
15 may do so under the ‘catch all’ provision similar to that recognized in U.S.S.G. Manual  
16 §1B1.13 n.1(D), that is, ‘an extraordinary and compelling reason other than, or in  
17 combination with, the reasons described in subdivisions (A) through (C)’ relating to  
18 prisoner health or family relations.” *United States v. Owens*, No. 97-CR-2546-CAB,  
19 ECF No. 93 (S.D. Cal. March 20, 2020) (quoting *United States v. O’Bryan*, No. 96-  
20 10076-03-JTM, 2020 WL 869475, at \*2 (D. Kan. Feb. 21, 2020)). After considering the  
21 issue, a number of district courts have held “‘they have the authority to reduce a  
22 prisoner’s sentence upon the court’s independent finding of extraordinary or compelling  
23 reasons.’ In other words, ‘district courts themselves have the power to determine what  
24 constitute extraordinary and compelling reasons for compassionate release.’” *Owens*, No.  
25 97-CR-2546-CAB (quoting *Young*, 2020 WL 1047815, at 6.). “While Sentencing  
26 Commission and BOP criteria remain helpful guidance, the amended § 3582(c)(1)(A)(i)

1 vests courts with independent discretion to determine whether there are ‘extraordinary  
 2 and compelling reasons’ to reduce a sentence.” *United States v. Decator*, 452 F. Supp. 3d  
 3 320, 324 (D. Md.), aff’d sub nom. *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020);  
 4 *see also United States v. Redd*, 444 F. Supp. 3d 717, 725 (E.D. Va. 2020) (“Application  
 5 Note 1(D)’s prefatory language, which requires a determination by the BOP Director, is,  
 6 in substance, part and parcel of the eliminated requirement that relief must be sought by  
 7 the BOP Director in the first instance, particularly since it would be unlikely that the BOP  
 8 Director would determine that an extraordinary and compelling reason exists under  
 9 Application Note 1(D) but then decline to file a motion for compassionate release based  
 10 on that determination.”).

11 Ngo’s motion arises out of the First Step Act’s change to the ability of prosecutors  
 12 to “stack” multiple counts of firearms violations under Section 924(c). Previously, and in  
 13 Ngo’s case, an offender would be faced with “stacked” charges of two Section 924(c)  
 14 counts from the same indictment, without a prior conviction of violating Section 924(c).  
 15 This resulted in defendants without a previous weapons conviction being charged in the  
 16 same indictment for both a first offense and a “second or subsequent offense” under  
 17 Section 924(c), and facing a 20- or 25-year mandatory minimum sentence. Pursuant to  
 18 the changes in the First Step Act, “an offender now faces a mandatory five-year  
 19 consecutive sentence, rather than an enhanced 20 or 25 year sentence, for a second or  
 20 subsequent § 924(c) conviction when multiple § 924(c) offenses are charged in the *same*  
 21 indictment without a previous final § 924(c) conviction.” *Redd*, 444 F. Supp. 3d at 720.

22 Ngo argues that “[t]he disproportionately long sentence [he] is serving, compared  
 23 to what he would serve after the First Step Act’s clarification of § 924(c) stacking, along  
 24 with his rehabilitation constitute an extraordinary and compelling reason for a sentence  
 25 reduction.” (ECF No. 60 at 8, ECF No. 67 at 8.) Ngo’s sentence was calculated based on  
 26 stacking the two § 924(c) counts from the same indictment to which he was convicted.  
 27

1 Indeed, if Ngo had been sentenced today, then his sentence would be considerably less,  
 2 because pursuant to the First Step Act, “§ 924(c) counts can only be stacked if the second  
 3 offense occurs after a final conviction on the first offense.” *United States v. O'Bryan*,  
 4 No. 96-10076-03-JTM, 2020 WL 869475, at \*1 (D. Kan. Feb. 21, 2020).

5 Several courts have held that this change in the calculation of sentences may  
 6 present an “extraordinary and compelling” reason under 18 U.S.C. § 3582(c)(1)(A),  
 7 including the Fourth Circuit and courts in the Southern District of California. *See e.g.*  
 8 *McCoy*, 981 F.3d at 285–86 (“We think courts legitimately may consider, under the  
 9 ‘extraordinary and compelling reasons’ inquiry, that defendants are serving sentences that  
 10 \*286 Congress itself views as dramatically longer than necessary or fair.”); *Owens*, No.  
 11 97-CR-2546-CAB, ECF No. 93 (“[T]he Court finds that extraordinary and compelling  
 12 reasons exist for a reduction in [defendant’s] sentence based on the changes in how §  
 13 924(c) sentences are calculated as a result of the First Step Act, combined with the  
 14 evidence of [defendant’s] rehabilitation . . . .”); *United States v. Lott*, No. 95-CR-72-  
 15 WQH, 2020 WL 3058093, at \*3 (S.D. Cal. June 8, 2020) (The court “determined that the  
 16 First Step changes to the § 924(c) may present an ‘extraordinary and compelling’ reason  
 17 for a sentence reduction in this case . . . .”); *United States v. Saenz* No. 97-CR-2106-JLS,  
 18 ECF No. 116 (S.D. Cal July 9, 2020) (“[S]everal courts have recognized that the disparity  
 19 in sentencing after the amendment of 18 U.S.C. § 924(c) under the First Step Act  
 20 constitutes an extraordinary and compelling reason for a sentence reduction . . . . This  
 21 Court agrees, particularly when combined with Defendant’s age-related medical  
 22 conditions and risk factors associated with COVID-19.”). Specifically, *Owens* presents  
 23 similar circumstances to the present case. This Court agrees that the injustice of facing a  
 24 prison term 15 years longer than it would be if he were sentenced today constitutes an  
 25 “extraordinary and compelling” reason for a reduction of sentence; particularly when  
 26 combined with evidence of Ngo’s rehabilitation.

Accordingly, the Court finds that extraordinary and compelling reasons exist for a sentencing reduction based on the changes in how Section 924(c) sentences are calculated as a result of the First Step Act.

### **C. Applicable Policy Statement from the Sentencing Commission**

The Court must also determine whether a reduction in Ngo’s sentence is “consistent with applicable policy statements.” 18 U.S.C. § 3582(c)(1)(A). “Congress directed the Sentencing Commission to promulgate policy statements ‘that describe what should be considered extraordinary and compelling reasons for a sentence reduction [under 18 U.S.C. § 3582(c)(1)(A)], including the criteria to be applied and a list of specific examples[,]’ restricting the Commission only to the extent that ‘rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.’”

*Redd*, 444 F. Supp. 3d at 724 (quoting 28 U.S.C. §§ 994(a)(2)(C) and (t)). The Government argues that the Court is restricted to the three specific circumstances of a defendant’s health, age, or family circumstances in determining whether there exists an “extraordinary and compelling” reason for sentence reduction. Further, the Government contends the BOP, and not the Court, has “discretion, based on its institutional experience, to determine other reasons that could be extraordinary.” (ECF No. 66 at 11.) In other words, the Government opines that the Court may not rely on the “catch-all” provision in the commentary to Section 1B1.13 of the Sentencing Guidelines.

“[T]he Court concludes . . . that there does not currently exist, for the purposes of satisfying the First Step Act’s ‘consistency’ requirement, an ‘applicable policy statement.’” *Redd*, 444 F. Supp. 3d at 724; see *Brown*, 411 F. Supp. 3d at 449 (“[T]he Commission lacks an applicable policy statement regarding when a judge can grant compassionate release” because it “never harmonized its policy statement with the [First Step Act].”). Courts that have come to this conclusion “have noted that § 1B1.13 was adopted before the First Step Act and does not contemplate motions for sentence

1 reductions filed by defendants themselves, or Congress’ express purpose in passing the  
 2 Act to increase the use of compassionate release.” *Owens*, No. 97-CR-2546-CAB (citing  
 3 *Maumau*, 2020 WL 806121, at \*3 (“The fourth category, by contrast, allocates significant  
 4 discretion to the Director of the Bureau of Prisons, which was consistent with pre-First  
 5 Step Act law but is no longer appropriate, given Congress’ decision to remove the  
 6 Director’s control over compassionate release motions.”)). The Court agrees that there is  
 7 no applicable policy statement, and thus finds that a reduction in Ngo’s sentence would  
 8 not be inconsistent with any applicable policy statement.

#### 9 **D. Legislative Intent**

10 There is currently a split among district courts as to whether Congress’s failure to  
 11 extend the § 924(c) changes retroactively in the First Step Act precludes courts from  
 12 granting compassionate release on that basis. *See, e.g. United States v. Johnson*, 2020  
 13 WL 6703090, at \*3 (M.D.N.C. Nov. 13, 2020) (“Congress expressly declined to make the  
 14 First Step Act’s sentencing changes in § 924 retroactive . . . . [Defendant] cannot use the  
 15 ‘extraordinary and compelling’ language from § 3582(a)(1)(A) to effectuate what  
 16 Congress expressly chose not to do when it revised § 924(c).”). The Government argues  
 17 the Court would be frustrating Congress’ legislative intent were it to find that the change  
 18 to sentencing under Section 924(c) constitutes an “extraordinary and compelling” reason  
 19 for sentence reduction. The Court disagrees with the Government’s contentions.

20 If sentenced today, both the Government and Ngo agree that Ngo would be subject  
 21 to a combined ten-year mandatory sentence for the weapons offenses, rather than the  
 22 twenty-five-year sentence he received, due to the amendments to Section 924(c). This  
 23 sentencing disparity “has been recognized in legislative history as a potentially available  
 24 basis for relief.” *Redd*, 444 F. Supp. 3d at n.8 (citing S. Rep. No. 98-225, at 55-56 (Aug  
 25 4. 1983) (“The [Senate Judiciary] Committee believes that there may be unusual cases in  
 26 which an eventual reduction in the length of a term of imprisonment is justified by

changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, *and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.*" (emphasis added))). Even if Congress had not intended the changes to Section 924(c) to apply retroactively across-the-board, that does not mean it did not intend courts to consider significant changes in the sentencing guidelines in determining whether compassionate release is appropriate in individual cases. See *McCoy*, 981 F.3d at 286. Accordingly, this Court finds that shortening Ngo's sentence would not be frustrating Congress' legislative intent.

#### E. § 3553(a) Factors

12 Before determining if compassionate release is warranted, the Court must also take  
13 into account public safety and the Section 3353(a) sentencing factors. 18 U.S.C. §§  
14 3553(a)(2)(C), 3582(c)(1)(A)(ii); U.S.S.G. 1B1.13(2). These factors include, among  
15 other things, the history and characteristics of the defendant; the need for the sentence  
16 imposed to reflect the seriousness of the offense and provide just punishment; and the  
17 need to avoid unwarranted sentence disparities among defendants with similar records  
18 who have been found guilty of similar conduct. 18 U.S.C. § 3553(a).

19 Ngo argues that these factors favor his release, due to the changes brought about by  
20 the First Step Act, his post-offense rehabilitation, and, if released, his plans to return to a  
21 supportive family environment in San Diego. Ngo further contends that “continued  
22 incarceration would be both disproportionate to the seriousness of his offense and to what  
23 Congress now deems appropriate for this kind of conduct.” (ECF No. 60 at 16 (quoting  
24 *Decator*, 452 F. Supp. 3d at 326).)

25 The sentencing guidelines indicate that courts should look to 18 U.S.C. § 3142(g)  
26 for guidance in determining whether the defendant poses a danger to the safety of any

1 other person or to the community. U.S.S.G. 1B1.13(2). The Court notes that Ngo was  
 2 found guilty of two counts of armed bank robbery, and two counts of using a firearm  
 3 during and in relation to those robberies. While Ngo's offenses "were undoubtedly  
 4 serious, [] his underlying offense conduct must be considered in connection with his  
 5 prospects for recidivism and his level of dangerousness to the public were he released.  
 6 But that underlying offense conduct must also be considered relative to the sentence he  
 7 received and any reduced sentence he would receive." *Owens*, No. 97-CR-2546-CAB  
 8 (quoting *Redd*, 444 F. Supp. 3d at 727).

9 Ngo now has served approximately 23 years, which is roughly 75% of his full  
 10 sentence. (ECF No. 60 at 1-3). His anticipated release date is slightly over three years  
 11 away, on March 15, 2024. (*Id.* at 13.) If he is released, Ngo would live with his sister and  
 12 her family in San Diego. (ECF No. 60 at 17; ECF No. 60-2, Exhibit M at 72.) Ngo's  
 13 sister and brother-in-law are also willing to hire him at their businesses, a salon and a tea  
 14 shop, respectively. (*Id.*) Further, Ngo's family belongs to a church in San Diego, and the  
 15 community will welcome Ngo to join their congregation. (*Id.*) While in prison, Ngo has  
 16 earned his GED and took a 600-hour course in Clerk Typing, earning the highest possible  
 17 grades. (ECF No. 60 at 15.) Ngo has also held several jobs throughout his time in  
 18 prison. (*Id.*) Although he had minor infractions in 2008, Ngo has had a minimal  
 19 disciplinary record while in prison. (*Id.*; ECF No. 60-2, Exhibit K at 67-68.) The  
 20 offenses for which Ngo was convicted were undoubtedly serious, as he not only caused  
 21 significant financial loss to the banks but threatened tellers and bystanders with a firearm  
 22 during the commission of the robberies. However, had he been sentenced today, he  
 23 likely would receive a total sentence of less than 16 years for the same conduct, assuming  
 24 the sentences for the robbery offenses would have remained the same. Ultimately, the  
 25 Court finds that despite the seriousness of Ngo's offense, releasing Ngo after having  
 26 served a majority of his sentence, and the equivalent of a far greater sentence than what  
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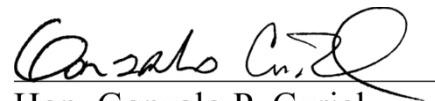
1 he likely would have received today for the same offenses, sufficiently mitigates the  
2 potential danger to the public and provide just punishment for the offenses. *Cf. Owens*,  
3 No. 97-CR-2546-CAB (granting release where defendant had served approximately 22  
4 years of his 33-year sentence).

5 **III. CONCLUSION**

6 For the reasons set forth above, the Motion for Compassionate Release is  
7 **GRANTED**, to be effective at the close of business today. Ngo's sentence is  
8 **MODIFIED** and **REDUCED** to time served pursuant to 18 U.S.C. § 3852(c), effective  
9 immediately. The term of supervised release previously ordered as to the Defendant will  
10 commence upon his release from imprisonment. Defendant is ordered to report to the  
11 U.S. Probation Office in San Diego, California within 72 hours of his release from  
12 incarceration.

13 The Government shall serve copies of this order on the Warden of Sandstone FCI  
14 immediately. The Warden shall immediately release Defendant Nam Nhat Ngo from  
15 custody. In the event that the Warden or any party requests any clarification of or  
16 modification to this order, they shall email such request to the Court immediately upon  
17 receipt of the order.

18  
19 Dated: March 1, 2021

  
20 Hon. Gonzalo P. Curiel  
21 United States District Judge

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